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No. 89-847 (2)

In The

Supreme Court of the United States

October Term, 1989

STUDIO ART THEATRE OF EVANSVILLE, INC.,
Petitioner,

vs.

STATE OF INDIANA,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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QUESTION PRESENTED

Whether a state may impose criminal penalties for the sale of materials which are obscene as to minors within 500 feet of a church or school.

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Respondent, State of Indiana, respectfully requests the Court to deny the issuance of a Writ of Certiorari directed to the Court of Appeals of Indiana and, thereby, refuse to review the decision entered by that court in Cause Number 82A01-8805-CR-152 on November 22, 1988.

OPINION BELOW

The opinion of the Court of Appeals of Indiana, First District, was rendered on November 22, 1988, and is reported at 530 N.E.2d 750 and set forth as Exhibit B to the Petition. A petition for rehearing was denied without opinion on January 31, 1989, and the Supreme Court of Indiana denied transfer on September 21, 1989.

STATEMENT OF THE CASE

This appeal is from a conviction for violation of Indiana's "Criminal Racketeer Influenced and Corrupt Organization Act" ("RICO statute"), IND.CODE § 35-45-6-2(a)(3), predicated upon acts alleged to be violations of IND.CODE § 35-49-3-3(3). That provision is the "obscenity as to minors" portion of the obscenity statute.

The facts in this case were determined in the trial court through stipulation.

In essence, the facts are as follows: Petitioner is a corporation which operates a "retail adult entertainment business" at 2113 West Franklin Street, in Evansville. As part of that business it owned and displayed or sold to adults four particular films on videocassette. The four films were entitled "Teenage Runaway," "Seduction of Lana Shore," "Boys in the Bath," and "Geisha's Slave." Petitioner stipulated that all four films contain "depictions of sexual conduct, nudity, and sexual excitement." It further stipulated that all four films, each taken a a whole, appeal "to the prurient interest in sex of minors," are "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable

matter for minors," and that when each is considered as a whole they lack "serious literary, artistic, political or scientific value for minors." Petitioner stipulated that it "participated" in the display or sale of films. It stipulated that the premises mentioned above were less than 500 feet from a school and two churches when measured by a straight line from a point in the property lines.

SUMMARY OF THE ARGUMENT

I. It is permissible to define a form of obscenity based upon harmfulness to minors and Indiana's statute does so with requisite clarity; the compelling State interest in protecting minors can be served, without needlessly preventing adults access to matter which while harmful to minors is not obscene to adults, by a proscription based upon geographical proximity to places where children regularly congregate, i.e., schools and churches; the proscription is not an establishment of religion but is based on the religiously neutral issue of the likelihood of the regular presence of children; and equal protection is not infringed since the material covered by the statute is obscene (hence, non-protected) as to minors when any prohibitions are so limited.

II. The addition of the scienter provision "knowingly" was a permissible non-substantive amendment to the original indictment and, while the change as amended was retyped for convenience, the formal requirements of a grand jury foreman's signature and the words "a true bill" were satisfied by their inclusion in the original indictment. their inclusion in the original indictment.

REASONS FOR DENIAL OF THE WRIT

I.

THE PREDICATE OBSCENITY STATUTE IS NOT UNCONSTITUTIONAL

Initially, Petitioner claims that the predicate "obscenity to minors" statute is unconstitutional because its subject is "non-obscene" (and hence presumptively protected) as to adults and precludes or limits distribution of such matter to adults; that basing its geographical scope upon proximity to a church is an "establishment" of religion prohibited by the First Amendment, and impermissibly delegates to a church a means to criminalize otherwise protected conduct; that the definition of "church" for this purpose is overly broad; and that the part of the scheme classifying and proscribing from limited areas "speech" deemed "harmful to minors" violates equal protection.

The State responds that it is permissible to define a form of obscenity based upon harmfulness to minors and that Indiana's statute does so with requisite clarity; that the compelling State interest in protecting minors can be served, without needlessly preventing adults access to matter which while harmful to minor is not obscene to adults, by a proscription based upon geographical proximity to places where children regularly congregates, e.g., schools and churches; that the proscription is not an establishment of religion but is based on the religiously neutral issue of the likelihood of the regular presence of children; and that equal protection is not infringed since the material covered by the statute is obscene (hence, non-protected) as to minors when any prohibitions are so limited.

Most of Petitioner's arguments are based on a claim of overbreadth. Thus, it is helpful to consider the guidelines for review of State statutes against overbreadth claims. Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985), reaffirmed these guidelines:

> 1. Never anticipate a question of constitutional law in advance of the necessity of deciding it.
> 2. Never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.
> 3. One to whom applicability of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.
> 4. The same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.
> 5. A law maybe narrowed by (1) legislative action, (2) judicial construction or (3) partial invalidation.
> 6. If a term in a statute is potentially overbroad, the law should be invalidated only so far as the term is to be understood as reaching protected materials.
> 7. Even if a term can only be interpreted in an unconstitutional sense, the proper remedy is to excise the term and leave the rest of the statute in place.

Petitioner recognizes that states are permitted to enact legislation to prevent exposure of minors to sexually explicit materials. On the other hand, the State may not fulfill that function by the expedient of banning material to the entire population (including adults) solely on the basis of its harmfulness to minors. Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524 (1957). The Michigan statute in that case made it an offense to make available to the general reading public a book found to have a potentially deleterious influence upon youth. Butler held the statute unconstitutional under the First and Fourteenth Amendments because it was not reasonably restricted to the evil which it was designed to prevent, thus reducing throughout the whole State of Michigan to reading only literature fit for children.

The State's ability to proscribe or limit access to a class of literature or other speech type material depends upon the well-established principle that a class of speech or press—obscenity—does not come within the area of constitutionality protected speech. Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed. 419 (1973). The statute can only limit access to literature if it does so on the basis of its being obscene. A statute directed at speech on the basis of its harmfulness specifically to minors must still be premised on the speech's obscenity, even if it is only deemed obscene to minors. Petitioner's argument assumes that the question of obscenity of a given item is a simple yes-or-no proposition: An item unless it is obscene to adults, is fully protected by the first amendment, even as to minors, in defendant's point of view. The

State submits that this assumption cannot be valid where it is proper (as defendant concedes Butler holds) to restrict speech in any way based on unsuitability for children. Such a statute must be treated as having established a special class of obscene material: that which is obscene (and unprotected) as to minors. Such material must thus be analyzed as having a limited sort of obscenity, remaining protected as to adults. But it is erroneous to call it "non-obscene" or deem it protected beyond its permissible adult audience.

Since the statute must be analyzed as an obscenity statute, albeit one limited by the speech's harmfulness to and potential for display to minors, then the standards of Miller v. California, supra, should apply here, contrary to the argument of appellant. The Miller test is well known. It considers whether the average person "applying contemporary community standards" would find that "the dominant them of the matter or performance, taken as a whole, appeals to the prurient interest in sex"; whether it depicts or describes sexual conduct "in a patently offensive way"; and whether taken as a whole it "lacks serious literary, artistic, political, or scientific value." Subsequently it has been held that "patent offensiveness" is to be judged also by the "contemporary community standards" test. Furthermore, "sexual conduct" must be specifically defined. Miller, supra. "Sexual conduct" is specifically defined in IND.CODE § 35-49-1-8. The obscene-to-minors statute may apply if either of these elements, or if "nudity" (specifically defined in IND.CODE § 35-49-1-5) or "sexual conduct" (specifically defined by IND.CODE § 35-49-1-9) are depicted or represented. This fully meets the requirement of Miller to specifically define the "sexual conduct" component of an obscenity statute. The three-pronged

Miller test (prurient interest when taken as a whole, patent offensiveness, and lack of value as a whole), as considered with reference to a minor audience, is the test used to determine if matter is "harmful to minors." This fully complies with Miller and so should be considered as a viable definition of a class of obscenity which applies in reference to minors.

Appellant stipulated that all four movies had all the characteristics of material defined as "harmful to minors" in IND.CODE § 35-49-2-2. The State would contend that this amounts to a stipulation that the movies were "obscene to minors" and that the State may therefore take reasonable measures to restrict their presence in areas near large gatherings of children, short of unduly preventing their access by the adult public.

Parenthetically, one must note that the Petitioner's ability to describe these films as having all the components of being "harmful to minors" as defined in IND.CODE § 35-49-2-2 necessarily means that the definition was not vague in its applicability to the video tapes. Further, the efforts Petitioner undertook (as Petitioner says more than once in its brief) to ensure no sale or display of its stock to minors—indeed, the store's very own self-description as an "adult" book store—must be taken as implicitly admitting that the store's stock in trade is harmful to minors. No, Petitioner cannot credibly complain of being misled by any purported vagueness of IND.CODE § 35-49-2-2.

Petitioner then discusses the purported overbreadth of IND. CODE 35-49-3-3(3). This is the only subsection of the statute that does not require a showing that minors did see or

were displayed the harmful material, or that the matter was displayed in an area accessible to children without their guardians. It proscribes sale or display of harmful material within 500 feet of a church or school. But Petitioner's argument relies on the Miller case, supra, and its progeny such as Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875 (1983); and Home Box Office v. Wilkinson, 531 F.Supp. 987, (D.C. Utah, 1982), which are all cases where a restriction limited the general adult reading or viewing public access to matter they were entitled to have if they wanted it. The instant statute, however, has no such effect. Its ambit is strictly limited to sale or display 500 feet or less—a minute's walk, perhaps—from churches and schools. Since by far the greatest percentage of land is outside such bounds, this amounts to no real infringement at all upon the adult viewing community's ability to get any material.

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981), and Schneider v. State of New Jersey, 308 U.S. 147, 60 U.S. 147 (1981), are fully distinguishable. Mt. Ephraim attempted to ban all dramatic presentations from the whole borough. In Schneider, the various jurisdictions (Los Angeles, CA; Irvington, NJ; Milwaukee, WI; and Worcester, MA) variously prohibited hand-bills and the like, except for the New Jersey town which prohibited all door-to-door canvassing or distribution of circulars without police permission. Thus, Schneider and Schad both involved the prohibition of a form of protected speech in public places throughout a community's jurisdiction. Los Angeles and Worcester prohibited distribution anywhere on their streets and alleys. The Court held that it was unavailing to argue that they could be distributed in other public places, since "the streets are natural and proper places for the dissemination of information and opinion . . ."

The instant statute is very narrow in its geographical range. It by no means prevents dissemination of material in a community in any way approafching the breadth of the restrictions in Schad or Schneider. Surely, it cannot be maintained that near schools and churches is the "appropriate" place to display or sell matter that is harmful to minors. If Michigan in the Butler case attempted to "burn the house to roast the pig" (as Justice Frankfurter put it) Indiana's statute keeps its heat in the oven.

Petitioner claims a violation of the establishment clause in including churches, with schools, as a basis for defining the area where IND.CODE § 35-49-3-3 proscribes sales of matter "harmful to children." But the statute passes the standard test of Establishment Clause violations, Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971): The Statute: (1) has the "secular legislature purpose" of protecting minors from harmful material; (2) neither advances nor inhibits religion as its primary or principle effect; and (3) does not foster "excessive government entanglement with religion."

The only one of these prongs contended to be present here is the "excessive entanglement" one. Appellant analyzes to Larkin v. Grendel's Den, Inc., 459 U.S. 116, 103 S.Ct. 505 (1985). There, an ordinance both advanced religion and created excessive entanglement by granting to all churches an optional power to compel an alcoholic beverage licensing commission to deny a license to any establishment within 500 feet. The crucial distinction is that the Larkin case's statute granted to any church a discretionary power to direct the outcome of a governmental determination. No such grant of governmental power is present here.

To try to establish an analogy, Petitioner posits that case of a church deliberately moving into the 500-foot radius of an adult bookstore for purpose of "criminalizing" its business. This must be rejected as speculative. There is no showing of record who was there first in this case, the churches or the store. The State suggests that, consistent with the principles of overbreadth claims as stated in Brockett, supra, this Court should wait until some such case appears and then decide whether the statute should be interpreted as not applying to "pre-existing uses."

Petitioner claims that statute is vague as regards the means to determine the 500-foot limit, and the definitions of "school" and "church." The State submit that in all cases the commonly understood, non-technical definition of these terms are perfectly apparent, so that the words are not apt to create any genuine uncertainty. "School" is usually felt to be an elementary or secondary school, grades K-12. Such a definition comports well with the statute's purpose. This is not such a case where there is uncertainty whether a "Methodist Church" or a "Catholic Church" is a "church" as contemplated by the statute. Again, "church" is a commonly understood term. And, absent any special qualifying language, the concept of being "X" distance "from" something is commonly understood as being that far on a straight line. The starting point is the nearest point on the property line of a church or school. That's clearly what the statute says. The statute does not discuss the location of the adult establishment's property line or front door. "Sale" or "display" is prohibited within 500 feet. The statute provides a clear way to find the area of the prohibition.

Petitioner claims that equal protection rights are violated by the statute by allegedly classifying "protected speech" into two types: "harmful to minors," the sale or display of which is geographically somewhat limited, and ordinary protected speech, which is unaffected. However, the State has already demonstrated that speech "harmful to minors" is a form of unprotected speech as it affects minors, rather than "protected speech." Petitioner's argument thus does not apply.

Thus arises the issue of how minors are "affected" by the statutory scheme. Does a 500-foot limit advance the State interest in protecting minors? Petitioner claims the prohibition of actual display or sale would be sufficient, and nothing more is added by the 500-foot limit. This is appellant's view under the test of City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249 (1985), it is protected by the First Amendment. Cleburne would sustain the 500-foot limit only if necessary to promote the compelling state interest; and the means chosen by the State must be precisely drawn as necessary to achieve this goal. Cleburne, supra; Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, 100 S.Ct. 2326 (1979). Protecting minors is a compelling state interest. The mere closing of an adult store to minors is not enough to achieve that goal. Most people who have gotten through their teens are aware of ways to circumvent age limits, ranging from false i.d. to hiring an adult to make the purchase. It is a well-known trait, particularly in children and adolescents, that the mere existence of a prohibition stimulates the desire for that which is prohibited. The nearer to school or church, where young people in large numbers are regularly and frequently together, the more visible and alluring a temptation the adult bookstore will be. The way there is the one the young person will most readily know. To be sure, there is nothing magic about 500 feet. But

it must be the case that the farther away the store, and, hence, the less associated with school or church, the less this type of temptation and opportunity are present. Twelve hundred feet or two miles limits might not be defensible, but 500 feet is a fairly respectable distance and is probably a good compromise between serving the state interest and avoiding actual infringement of adult access to the material.

Petitioner claims an additional unlawful "taking" in the claimed enactment of IND.CODE § 35-49-3-3(3) after the founding of its store. However insofar as the State can determine, the age of the store is not a matter of record here.

The current IND.CODE § 35-49-3-3 was enacted in 1983. P.L. 311-1983, Sec. 33. Its predecessor statute, IND.CODE § 35-30-11.1-1(3)(repealed) also contained the same prohibition on sale or display to any person of material which was harmful to minors within 500 feet of the nearest church or school property line. It was enacted in 1975. P.L. 342, § 1, p. 1816. There is nothing in this record from which to infer Petitioner's business was at that premises any earlier than that. Indeed, Petitioner did not exist prior to September 18, 1978, when it was incorporated.

Petitioner attacks the obscenity statute on the basis of an alleged lack of a scienter provision. As related to these facts, (that is, omitting irrelevant language), the statute reads: "A person who knowingly ... displays for sale to any person matter that is harmful to minors within five hundred (500) feet of the nearest property line of a ... church ... commits a Class

A misdemeanor." IND.CODE § 35-49-3-3(3). It is true that specific allegations and proof of knowledge are required in an obscenity case. Pursuant to the rules for overbreadth, Brockett, supra, the terms "knowingly" or "intentionally" must be construed narrowly, so they must be held to refer to knowledge or intent of the circumstance that is required for conviction: Namely, these "scienter" terms must be construed to mean knowledge that contents of obscene material are "obscene" or "harmful to minors." Proof of the scienter element may be established by circumstantial evidence. Richards v. State, Ind.App., 461 N.E.2d 744 (1984); Sedelbauer v. State, Ind., 428 N.E.2d 206, (1981), cert. denied 455 U.S. 1035. (Petitioner does not claim that the State failed to prove this scienter element.)

Indiana's statute adequately defines the crime (including descriptions of what is "harmful to minors" and a scienter provision construed to mean knowledge of the nature of the contents). Its limited geographic scope does not act in any meaningful way to limit adult access to material that is protected as to adults. It does not rest on any grant of preference that promotes or establishes religion, nor does it entangle religion in the governmental process. There is a rational basis for a statute that prohibits sale of sexual matter that is harmful to minors within 500 feet of a church or school. The statutory language has a clear meaning that this distance is a "straight line" measure. This meaning legitimately advances the purpose of the statute.

In short, IND.CODE § 35-49-3-3(3), as applied, should be held to be constitutional.

The Indiana RICO statute closely resembles the federal RICO statute. 18 U.S.C. § 1961 et seq. The police reasons for the adoption of RICO statutes are clearly set forth in Russello v. United States, 464 U.S. 16 (1983) and need not be repeated here. The federal statute has withstood challenges for vagueness and overbreadth. United States v. Tripp, 782 F.2d 38, (6th Cir., 1986), cert. denied, 106 S.Ct. 1656; United States v. Martino, 648 F.2d 367 (5th Cir., 1981), reconsidered in part, 650 F.2d 651, cert. denied 456 U.S. 943, 949, on reh. f681 D.2d 952, affirmed 104 S.Ct. 296; United States v. Sividerski, 593 F.2d 1246 (D.C. Cir., 1978), cert. denied 441 U.S. 933.

This Court has considered the question of whether the RICO statutory scheme even (including the RICO civil remedies statute IND.CODE § 34-4-30.5-2) as it pertains to the predicate offense of obscenity violates the First and Fourteenth Amendments to the United States Constitution. Fort Wayne Books, Inc. v. Indiana, 489 U.S. __, 103 L.Ed.2d 34 (1989). The Fort Wayne Books case contains a detailed analysis, that need not be repeated here. This Court concluded that such application of the statute did not violate the Constitution. Petitioner here makes essentially the same claims rejected there.

II.

THE CHARGING INSTRUMENT IS NOT FATALLY DEFICIENT AS TO FORM

In this issue, Petitioner contests failure to dismiss the Amended Indictment where, when amended (an amendment it claims impermissibly went to substance), it lacked the signature of any grand juror or the words "a true bill."

The State responds that the addition of the scienter provision "knowingly" was a permissible non-substantive amendment to the original indictment and that, while the charge as amended was retyped for convenience, the formal requirements of a grand jury foreman's signature and the words "a true bill" were satisfied by their inclusion in the original indictment.

Indiana Code 35-34-1-12(b) requires that an indictment to be valid, must be signed by the foreman or five other grand jurors, and be endorsed with the words "a true bill." If this requirement is not to be considered mere meaningless formalism, it must be seen to have a purpose. This subsection requires that five jurors, at least, concur. The endorsement, "a true bill" and the signature or signatures must be intended to certify that the indictment as presented is the actual charge concurred in by a majority of the grand jury. It shows a proper return of an indictment to the court by the grand jury. Epps v. State, 102 Ind. 539, 1 N.E. 491 (1885).

Once an indictment is returned the State, by the prosecutor, may amend the indictment. If the indictment is not one of substance, such amendment may occur at any time, so long as petitioner is afforded an adequate opportunity to prepare his defense. Pennington v. State, Ind., 523 N.E.2d 414 (1988); Daniels v. State, Ind., 453 N.E.2d 160 (1983). Immaterial defects may be permitted to be cured by amendment. Starkes v. State, Ind., 517 N.E.2d 46 (1987). Changes of form are also permissible. Henderson v. State, 273 Ind. 334, 403 N.E.2d 1088 (1980).

Here, the State dropped several counts and added the scienter provisions "knowingly." This change did not alter in any way the applicability to the charges of any evidence the petitioner might have. Nor did it affect any available defense. Hence, it was a change of form only, and not of substance. Hence, it was a permissible amendment. See Johnson v. State, 258 Ind. 383, 287 N.E.2d 473 (1972).

In this case the signature and endorsement properly appeared on the indictment as originally presented. This was adequate to inform the court that the grand jury had in fact returned such an indictment. This prosecutor made a permissible amendment. He could have interlineated and scratched omitted portions out all over the original indictment. Instead, he amended the indictment by having it typed up as amended. If he is permitted to amend, why not allow him to do so by presenting a clean new document embodying the amended text? (The prosecutor's signature in the space originally occupied by the foreman's may then be seen as his endorsement of the amendments.)

Petitioner's argument should be rejected as an attempt to elevate substance over form.

CONCLUSION

For the foregoing reasons, the Respondent, State of Indiana, respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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